UNITED STATES
v.
ROBERT G. McEWEN

IBLA 93-368 Decided April 7, 1994

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., prohibiting placer mining on placer mining claim
CA MC 244163.

Affirmed.

1. Act of Aug. 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands--Withdrawals and Reservations: Powersites

Evidence produced at a hearing held pursuant to the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1988), established that placer mining on land subject to a powersite withdrawal would interfere with recreational use of the land and that the benefits of mining were outweighed by the benefits derived from recreational use; an order prohibiting placer mining on the claim was therefore properly entered.

APPEARANCES: Robert G. McEwen, Nevada City, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Robert G. McEwen has appealed from an April 5, 1993, decision of Administrative Law Judge John R. Rampton, Jr., that prohibited placer mining on the Upper Mystic placer mining claim, CA MC 244163. The Upper Mystic claim was located on February 23, 1991, in the E½ NE¼ SE¼, sec. 28, T. 17 N., R. 8 E., Mount Diablo Meridian, Nevada County, California, on land with-drawn for powersite purposes by powersite classification No. 183 on
July 9, 1927. Pursuant to the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621(b) (1988), a hearing was held at Nevada City, California,
on November 17, 1992, to determine whether placer mining on the Upper Mystic claim would substantially interfere with other uses of the powersite lands on which the claim was located. Following hearing, Judge Rampton issued his 1993 decision prohibiting placer mining that is here under review.

At the hearing, four witness testified on behalf of the Bureau of Land Management (BLM) concerning the effect placer mining at the Upper Mystic claim would have on recreational uses of the claimed land and the adjacent bed of the South Yuba River. McEwen did not appear at the hearing. On

April 5, 1993, Judge Rampton issued his decision, finding that the negative impacts of mining exceeded negative impacts of recreational uses of the land, while the benefits of mining were far outweighed by the benefits from recreational use of the land, and concluding that placer mining of the claim should be prohibited.

On appeal, McEwen argues that the notice of hearing was deceptive because, instead of using the statutory language of the Mining Claims Rights Restoration Act to describe the purpose of the hearing, it should have stated directly that "a hearing is being set to prohibit mining on the Mystic claim." He explains that he did not attend the hearing because of illness, and disputes testimony offered at hearing by BLM's geologist concerning the geology of the Mystic claim. He also denies that he has damaged trees growing near his mining operations. He argues that, if there have been civil disturbances near mining operations on the river, that tourists, not miners, have been to blame. Finally, he contends that his operations on the river were not subject to BLM regulation and did not require a plan of operations because they were "under 5 acres at the time that I was mining."

[1] After summarizing the evidence presented at hearing in a decision which we adopt and attach hereto as Appendix A, the Administrative Law Judge addressed the question whether placer mining on the claim would substantially interfere with other uses of the land within the purview of the Mining Claims Rights Restoration Act, 30 U.S.C. § 621(b) (1988). He correctly determined that application of the statutory standard required the Department to weigh the benefits of mining against the benefits to be obtained from other uses (principally recreation in this case), while considering the injury either activity would cause to the land at issue. See United States v. Milender, 104 IBLA 207, 220, 95 I.D. 155, 163 (1988) (benefits of placer mining considered in relation to use of the same land for silviculture); United States v. Brown, 124 IBLA 247, 252 (1992) (benefits of placer mining considered in relation to use of the same land for recreation). McEwen does not dispute that Judge Rampton correctly stated the Mining Claims Rights Restoration Act and properly applied it to the facts of this case, and we conclude that he did. See Appendix A.

The Administrative Law Judge also found that the notice given to McEwen of the time, place, and purpose of the hearing was adequate. Although McEwen now argues that the notice should have stated in advance the conclusion that was ultimately reached at hearing, such a notice would have been improper; the result ultimately reached was not a foregone conclusion before the hearing was conducted, for before the facts of the case were known there could as well have been a finding that mining should be allowed. See e.g. United States v. Milender, 95 I.D. at 170 (mining allowed on a placer claim within a powersite withdrawal). The notice properly stated the purpose of the hearing, which was to inquire into whether placer mining should be allowed under circumstances that might be shown to exist at the Upper Mystic claim. While McEwen suggests that he may have been unable to attend the hearing for other reasons, nonetheless, he did not request a postponement of the hearing (which may be had "upon a showing of good cause" under 43 CFR 4.452-3(a)), nor has he requested that the hearing be reopened to permit introduction of new evidence. The Administrative Law Judge's finding that

adequate notice of hearing was provided is therefore affirmed. See Appendix A.

McEwen questions whether the BLM geologist who evaluated the Upper Mystic claim had direct knowledge of the geology of the claim, arguing that the claim contains only a fraction of the minable material estimated by the geologist in his testimony describing a placer operation in the river on the Upper Mystic claim. No evidence has been offered, however, to support the stated conclusion, the effect of which would be to decease the ultimate value of minerals available within the limits of the Upper Mystic placer claim. Since, by the testimony of the BLM geologist, this value was shown to be far less than that which could be derived from recreational uses of the claim, the effect of this argument would be to bolster the finding by the Administrative Law Judge that the benefits of the principal competing use exceeded those to be had from placer mining the Upper Mystic claim. See Appendix A.

McEwen contends that because his operation affects less than 5 acres it is not subject to BLM regulation because it is only a casual use of public resources. In a case involving dredging on the Merced River, Lloyd L. Jones, 125 IBLA 94, 98 (1993), we rejected the argument that disturbance of less than 5 acres by a mechanized dredging operation must be considered casual use and affirmed a decision requiring a modified plan of operations and a performance bond for the operation at issue. See 43 CFR 3809.1-4(b), defining "casual use" as activity "resulting in only negligible disturbance of the Federal lands and resources" that does not involve "use of mechanized earth moving equipment." The statement by McEwen of the bare conclusion that his operation affects less than 5 acres has not established that it amounts to casual use within the meaning of the Departmental regulation defining that term. Such a showing is required if he is to avail himself of this exception to the requirement that he operate under an approved plan of operations when using mechanized earth moving equipment such as a dredge. See Lloyd L. Jones, 125 IBLA at 98.

Assuming that McEwen has, as he contends, been careful to avoid damage to resources or conflict with tourists on the river, nonetheless testimony at hearing concerning complaints about resource damage by river dredgers and conflicts between tourists and miners that was given by a California Park Superintendent and Park Ranger is not discredited by McEwen's statement of events. The testimony of the State employees was that, in general, in addition to reports of damage to vegetation, gravel beds, and generation of noise, there were abusive confrontations between miners and tourists involving dredging operations on the river. See Tr. 30, 32, 34. The testimony of a California Deputy Sheriff, which was directed particularly to complaints made against McEwen, was that there had been such conflicts that involved McEwen directly. See Tr. 37. This testimony is not contradicted by McEwen's explanation that the conflicts described did not originate with any action on his part; his statement confirms the occurrence of such conflicts. Nor does he deny that dredging operations can cause damages to the Federal resource described by the State employees.

On the record before us, we conclude that the Administrative Law Judge

correctly stated the applicable law and properly applied it to the facts established at hearing. McEwen has failed to show error in the 1993 decision which we have adopted as the opinion of the Board in this appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

pages 103 - 107 are copy of ALJ decision